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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 181.

PHILADELPHIA BAR ASSOCIATION

affd

JOHN B. STONE, JOHN W. ENGLISH, AND R. C. BERTRAND, PLAINTIFFS IN ERROR,

vs.

THE STATE OF MISSISSIPPI, EX REL. GEORGE E. HARRIS, ATTORNEY GENERAL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

FILED SEPTEMBER 15, 1877.

I do not regard a lottery grant as a contract within the meaning of the Federal Constitution. The State, by contract, ties its hands so that it cannot make that a crime which every body knows to be injurious to the public morals.

SUPREME COURT OF THE UNITED STATES.

No. 181.

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1 THE STATE OF MISSISSIPPI, BY GEORGE E. Harris, attorney-gen'l,
vs.
JOHN B. STONE, J. W. ENGLISH, R. C. Bertrand, and Peter Casey.

Pleas before the Hon. George F. Brown, judge of the 15th judicial district of said State of Mississippi, in and for the county of Warren, at the court-house thereof, in the city of Vicksburg, on the 20th day of December, 1875.

Be it remembered that heretofore, to wit, on the 17th day of March, A. D. 1874, the plaintiff, by their attorney, filed their quo warranto in the office of clerk of the circuit court of Warren County, State of Mississippi, which is in the words and figures following, to wit:

Information.

Circuit court, March term, 1874.

STATE OF MISSISSIPPI,
Warren County:

To the Hon. Geo. F. Brown, judge of the fifteenth judicial district:

George E. Harris, attorney-general of the State of Mississippi, and prosecuting on behalf of said State, comes here into the court aforesaid, to wit, the circuit court of said county and State for the term aforesaid, and on the 16th day of March, 1874, and for the said State of Mis-
2 sissippi gives the court here to understand and be informed that John B. Stone, J. W. English, R. C. Bertrand, & Peter Casey, of said county and State, for the space of twelve months now past, or more, hath used, and does still use, without warrant or grant of law the following liberties and franchises, to wit:

The said John B. Stone, J. W. English, R. C. Bertrand, and Peter Casey, without warrant or authority of law, do carry on a lottery or gift enterprise within said county and State under the name of "The Mississippi Agricultural, Educational, and Manufacturing Aid Society."

That said society was chartered by the legislature of the State of Mississippi by act approved 16th February, 1867, which said act, among other things, allowed said society to sell and dispose of certificates of subscription, which shall entitle the holder thereof to any articles that may be awarded them, and the distribution of awards shall be fairly made in public, after the advertisements, by the casting of lots, or by lot, chance, or otherwise, in such manner as shall be directed by the laws of said corporation, and shall be made at its office in Vicksburg, or at any other convenient place in the State that may be selected.

That said company shall go into operation under its charter,
3 and said charter shall continue and be in force for the space of twenty-five years from the date of its passage.

That the constitution of the State of Mississippi, Article XII, section 15, declares that the legislature shall never authorize any lot'ery, nor shall the sale of lot'ery tickets be allowed, nor shall any lottery heretofore authorized be permitted to be drawn or tickets therein to be sold.

That by an act approved 16th July, 1870, entitled "An act to enforce the provisions of the constitution prohibiting all kinds of lotteries and

making it unlawful to conduct one in this State," the charter of the aforesaid corporation under the name of the "Mississippi Agricultural, Educational, and Manufacturing Aid Society" was declared unconstitutional, and by that virtually repealed.

Whereupon the said George E. Harris, attorney-gen'l aforesaid for the State aforesaid, prays the advices of the court in the premises, and due process of law against the said J. B. Stone, J. W. English, R. C. Bertrand, and Peter Casey in this behalf to be made to answer to said State of Mississippi by what warrant they claim to have, use, and enjoy the liberties, privileges, franchises, and emoluments aforesaid,
4 and for such judgment as your honor may see the State of Mississippi entitled to.

GEORGE E. HARRIS,
Attorney-General for the State.

(Endorsed:) Filed and writ issued M'ch 17th, 1874. A. W. Dorsy, clerk.

And upon the same day of filing the quo warranto the following summons was issued, which is in the words and figures following, to wit:

Summons.

The State of Mississippi to the sheriff of Warren County, greeting:

You are hereby commanded to summon J. W. English, J. B. Stone, R. C. Bertrand, and Peter Casey, if to be found in your county, to be and appear before the circuit court to be held at the court-house in and for the county of Warren, on the 4 Monday of March, 1874, next, to answer the complaint of State of Mississippi upon complaint filed by attorney-general against them in the nature of a quo warranto, and have then and there this writ.

Witness my hand and seal of said court at office in the city of Vicksburg, this the 17th day of March, 1874.

[SEAL.] A. W. DORSEY, *Clerk*,

5 (Endorsed:) Received this 17th day of March, A. D. 1874.
PETER CROSBY, *Sheriff*,
By CALVIN CHURRIS, *D. S.*

I hereby appoint Wm. H. McGee special deputy to execute and return the within writ this 17th day March, A. D. 1874.

[SEAL.] PETER CROSBY,
Sh'ff of Warren County, Mississippi.

Sheriff's return.

Summoned the within named defendant, J. W. English, personally to appear and answer this writ, and delivered him a true copy of the same this the 17th day of March, A. D. 1874.

The within named John B. Stone, R. C. Bertrand, and Peter Casey not found in my county.

PETER CROSBY, *Sheriff*,
By WM. O. McGEE, *Sp'l D. S.*

Afterwards, to wit, on the 6th day of July, A. D. 1875, defendants, by attorney, filed their answer to information quo warranto, which is in the words and figures following, to wit:

Answer to information.

Circuit court, March term, 1874.

THE STATE OF MISSISSIPPI,
Warren County:

The joint answer of John B. Stone, J. W. English, R. C. Bertrand, and Peter Casey to the information filed in the circuit court by
6 George E. Harris, attorney-general for and on behalf of the State of Mississippi:

For answer in this behalf to the said State these respondents say that it is true as is stated in said information, that they do carry on a lottery enterprise within Warren County and said State under the name of the Mississippi Agricultural, Educational and Manufacturing Aid Society, and that said society was chartered by the legislature of the State of Mississippi by an act approved 16th January, A. D. 1867, entitled "An act incorporating The Mississippi Agricultural, Educational and Manufacturing Aid Society," which respondents here specially plead and which is made a part of this answer marked A.

That it is true that they have been for the space of twelve months past or more exercising the rights, privileges, and franchises authorized by the said act of incorporation.

They further admit that there is in the constitution adopted in convention May 15th, 1868, and ratified by the people December 1st, 1869, a provision, Art. XII, section 15, which declares the legislature shall never authorize any lottery nor shall the sale of lottery tickets be allowed nor shall any lottery heretofore authorized be permitted to be drawn or tickets therein to be sold, and further, respondents admit that by an act entitled "An act enforcing the provisions of the con-
7 stitution of the State of Mississippi, prohibiting all kinds of lotteries within said State and for other purposes," approved July 9th, 1870, it was made unlawful to conduct a lottery in the State of Mississippi. But respondents declare and charge that the said charter of incorporation under which they acted was not repealed by the provisions of the constitution and the said act of the legislature of the State, and that the constitution was adopted and the act of the legislature aforesaid passed after the said Mississippi Agricultural, Educational and Manufacturing Aid Society had been incorporated, and that they were engaged in business under their said charter.

That respondents under their said charter had acquired a vested right by *by* contract with the State which could not be divested by the subsequent adoption of the constitution and the passage of the act of the legislature, and that said provisions of the constitution and the said act of the legislature are in violation of that provision of the Constitution of the United States which forbids a State from passing a "law impa'r-ing the obligation of contracts."

Respondent' further declare that they have fully in all things complied with the provisions of their said charter of incorporation,
8 and have in no wise forfeited the same, and that the rights, privileges, and franchises granted to them by their said charter hereinbefore specially pleaded, have not been impaired by the said constitutional provision and the act of the legislature aforesaid, and that it is by virtue of their said charter that they claim to use and enjoy their rights, privileges, and franchises thereunder.

Wherefore they pray judgment and that said information may be dismissed.

GEORGE K. BIRCHETT,
Att'y for Stone et al.

Exhibit A to the answer.

A bill to be entitled "An act incorporating the Mississippi Agricultural, Educational and Manufacturing Aid Society."

SEC. 1. Be it enacted by the legislature of the State of Mississippi, that John K. Yerger, Albert S., and al., and such other persons as may be associated with them, and their successors, be, and they are hereby, created a bodycorporate by the name of the Mississippi Agricultural, Educational and Manufacturing Aid Society, for the purpose of encouraging manufactures and agriculture, and to aid in raising a fund to educate destitute orphans in the State of Mississippi.

9 SEC. 2. Be it further enacted, That the said corporation shall have the power to purchase and hold, sell, transfer and convey such real and personal property as may be necessary for its purposes, to make contracts; sue and be sued in any court of law or equity in the State by its corporate name; and may have and use a common seal which can be altered or abolished at pleasure.

SEC. 3. Be it further enacted, That the capital stock of said corporation shall be one hundred thousand dollars, and may be increased to five hundred thousand dollars if the business of the corporation shall justify such increase, and the same shall be divided into shares of hundred dollars to be called in at such times and in such amounts as the corporation may, upon due notice given, direct, and may by transfer'ed by assignment on the books of the corporation, and each share shall entitle the owner thereof to one vote in the business direction of the corporation in person or by proxy, in accordance with the by-laws of said corporation, and each stockholder shall be individually liable to the creditors and beneficiaries of said corporation to the extent of his or her stock.

10 SEC. 4. Be it further enacted, That books of subscription to the capital stock of said corporation shall be opened by the corporators above named, at a convenient time and place, to be fixed by them after ten days' notice thereof; and when the sum of one hundred thousand dollars is subscribed, said books may be closed and the corporation may thereupon organize itself by the election of a president, vice-president, secretary and treasurer, who shall hold their office for one year and until their successors are elected, and the said officers shall constitute the board of directors of said corporation, and shall manage and control its business under such restrictions, resolutions and by-laws as the stockholders may make.

SECTION 5. Be it further enacted, That the stockholders shall hold annual meetings at such time and place as they may determine, and may have called meetings upon due notice given by the president or three stockholders, as the by-laws may direct, and at said annual meetings the officers of the corporation shall be elected, and a record of the proceedings of all meetings shall be kept, subject to the inspection of every stockholder, and if any stockholder shall fail to pay his

11 stock upon call as herein provided, he may be sued *sued* for the same in any court having jurisdiction.

SEC. 6. Be it further enacted, That the said corporation shall have power to receive subscriptions and sell and dispose of certificates of sub-

scription which shall entitle the holders thereof to any article that may be awarded to them, and the distribution of the awards shall be fairly made in public after advertising, by the casting of lots or by lot, chance or otherwise in such manner as shall be directed by the by-laws of the said corporation, and shall be made at its office at Vicksburg, or at any other convenient place in the State that may be selected by the corporation, and the said distribution of awards may be made at any time and as often as the corporation may deem necessary: Provided, That before any distribution is made they shall advertise in a newspaper or by some other method a list of all the articles to be awarded at the distribution, and the value of each and all in money annexed, and the said corporation shall have the power to offer premiums or prizes in money to
12 the best essays on aggriculture, manufactures & education written by a citizen of Mississippi, or to the most deserving works of art executed by citizens of Mississippi, or the most usefull inventions in mechanics, science or art, made by citizens of Mississippi.

SEC. 7. Be it further enacted, That the articles to be distributed or awarded may consist of lands, books, paintings, statutes, antiques, scientific instruments, or apparatus or any other property or thing that may by ornamental, valuable, or usefull, and to prevent fraud or unfair speculation, any holder of a certificate, if he has cause to believe that the article or premium awarded to him is not worth the value annexed to it in the published list, may have the same appraised by two or more disinterested persons, and if it be decided by them that the article in question is not worth its annexed value as published, they shall appraise the same at fair market value, and then the holder of said certificate, instead of the article in question may demand its annexed value in money, or he may demand the article and so much money in addition thereto as will equalize its appraised value with its published value in the list, and he may enforce his right herein, in contested, by motion, after ten days' notice, for judgment, and ten per cent. damages
13 against the corporation in any court having jurisdiction.

SECTION 8. Be it further enacted, That the said corporation shall, before commencing business, pay to the State treasurer for the use of the university the sum of five thousand dollars, and shall give such bond and security as the secretary of state may approve, for the payment into the State treasury an annual tax of one thousand dollars, and an additional tax of one-half of one per cent. on the amount of receipts derived from the sale of certificates or tickets, to be assessed and collected in the same manner and at the same time as the ordinary taxes of the State.

SEC. 9. Be it further enacted, That the said company shall, in the month' of January and July of each year, publish in a newspaper in Warren County a statement of the number of the tickets sold, the character and value of the prizes sold, and amount received from the sale of tickets during the preceeding six months, which statement shall be signed and sworn to by the president and secretary of said company, and a copy sent to the secretary of the state. Any nneglect or refusal to comply with the provisions of this bill shall work a forfeiture of all the
14 privileges herein granted, and if any officer or agent of said company shall violate the provisions of this charter, or shall fail to carry out the provisions of this bill according to its publication, or shall commit any fraud in selling tickets, or drawing on lottery, he or they shall be guilty of a misdemeanor, and subject to indictment, and upon conviction thereof shall be fined not less than one thousand dollars and imprisoned in the county jail not less than six months.

SEC. 10. Be it further enacted, That the said corporation may establish offices or agencies at Columbus, Meridian, Hernando, Holly Springs, Natchez, and such other points as said corporation may see proper, which offices or agencies shall be subject to such rules and regulations as said corporations may establish not inconsistent with this charter and the laws of the State.

SEC. 11. Be it further enacted, That so soon as the sum of one hundred thousand dollars is subscribed, and the sum of twenty-five thousand dollars thereof paid into the capital stock of said company, the company shall go into operation under this charter, and not before, and that this act of incorporation shall continue and be in force for the space of twenty-five years from the date of its passage, and that all laws and parts of laws in conflict with its provisions be repealed, and this act shall take effect from and after its passage.

Approved February 16th, 1867.

(Endorsed:) Filed July 6th, 1874. A. W. Dorsey, clerk.

And plaintiff's reply to defendant's answer to information quo warranto is in the words and figures following, to wit:

It is admitted on the part of relator that as a matter of fact the defendant' *the defendants* have in every particular conformed to the provisions of their charter.

MAGRUDER & SIMRALL,
For Information.

Afterwards, to wit, on the 20th day of December, this cause coming on for hearing before the circuit court of Warren County, the 20th day of December, being a day of the November term, 1875, of said court, the following judgment was rendered in said cause, to wit:

In circuit court, Warren County.

THE STATE OF MISSISSIPPI, BY GEORGE E. Harris, att'y-gen'l,
vs.
JOHN B. STONE, J. W. ENGLISH, R. C. BERtrand, & Peter Casey.

This day comes the said George E. Harris, for and on behalf of the said State of Mississippi, and the said defendants, by their attorney, and the said cause having been submitted to the court, and the court having duly considered the matters and things arising upon the record and pleadings in said cause, and it being admitted by the relators that the said Mississippi Agricultural, Educational and Manufacturing Aid Society, organized under and fully complied with all the provisions of said act of incorporation, and was engaged in business thereunder; and the court being satisfied that under the constitution of said State, article (XII) twelve, section (15) fifteen, and by an act of the legislature of said State of Miss., approved July 16th, 1870, entitled "An act to enforce the provisions of the constitution prohibiting all kinds of lotteries, and making it unlawful to conduct one in this State," that the said act of the legislature of Mississippi, entitled "An act incorporating the Mississippi Agricultural, Educational and Aid Society," approved February 16, 1867, is abrogated and annulled, and that the said defendants are, under the said constitution of said State and

act of the legislature aforesaid of said State, unlawfully exercising the liberties, privileges, franchises, and emoluments granted under their said charter of incorporation, to wit, an act entitled "An act incorporating the Mississippi Agricultural, Educational and Manufacturing Aid Society," approved Feb'y 16th 1867, it is there fore considered by the court and ordered that the said defendants be ousted of and from all the liberties and privileges, franchises and emoluments exercised by them under and by virtue of the said act of incorporation entitled, "An act incorporating the Mississippi Agricultural, Educational and Manufacturing Aid Society," approved Feb'y 16th, 1867, and that they, the said defendants, pay the cost of these proceedings.

Afterwards, to wit, on the 22 day of December, A. D. 1875, defendants, by their attorney, filed their motion for new trial as follows, to wit:

THE STATE OF MISSISSIPPI
vs.
JOHN B. STONE ET AL.

And comes the said defendants and moves the court for a new trial, and for reasons assigns that the judgment of the court is contrary to law and the evidence admitted by the record in the cause and in open court.

BERCHETT & GILLAND,
Atty's for Respondent.

(Endorsed:) Filed December 22, 1875. J. W. Short, clerk, by Geo. F. Brown, jr., D. C.

And afterwards, to wit, on the 22 day of December, 1875, the following was an order of court overruling motion:

THE STATE OF MISSISSIPPI
vs.
JOHN B. STONE ET AL.

And comes this day the said defendants and moves the court for a new trial, and for reason assigns that the judgment of the court in said cause is contrary to law and the evidence admitted by the record in said cause and in open court; which said motion having been duly considered by the court, is by the court overruled, and to the overruling of which motion defendants excepted.

And afterwards, to wit, on the 22d day of December, 1875, defendant filed his bill of exceptions, which is in the words and figures following, to wit:

In circuit court. To Nov. term, A. D. 1875.

STATE OF MISSISSIPPI,
Warren County:

THE STATE OF MISSISSIPPI EX REL. GEORGE E. Harris, att'y gen'l,
vs.
JOHN B. STONE ET AL.

Be it remembered that on the trial of the above stated cause the defendants introduced in evidence an act of the legislature of the State

of Mississippi, entitled "An act incorporating the Mississippi Agricultural, Educational, and Manufacturing Aid Society," approved February 16th, 1867. And defendants also offered to prove the following facts: That the said Mississippi Agricultural, Educational, and Manufacturing Aid Society organized under and fully complied with all the provisions of their said act of incorporation, and was engaged in business thereunder at the time of the adoption of the present constitution of said State, and that the defendants have in every particular conformed to the provisions of their said charter; all which facts were by the relator herein admitted to be true in open court.

Whereupon upon the matters of law arising upon the pleadings
20 and the facts, the court judgment against the defendants herein, to which judgment of the court the defendants then and there excepted, and thereupon moved the court for a new trial, and for reason assigned that the judgment of the court is contrary to law and the evidence admitted by the record in the cause and in open court, which motion, being argued and submitted, the court overruled the same.

To which ruling of the court defendants then and there excepted, and tendered this their bill of exceptions, and pray that the same may be signed and sealed and made a part of the record in this cause, which is accordingly done in open court this 22 day of December, 1875.

[SEAL.] GEORGE F. BROWN, *Judge*.

(Endorsed:) Filed December 22d, 1875. J. W. Short, clerk, by George F. Brown, jr., D. C.

And afterwards, to wit, on the 22nd day of December, A. D. 1875, defendants filed their petition for writ of error, which is in the words and figures following, to wit:

21 To J. W. Short, clerk of the circuit court of Warren County, 15th judicial district of Mississippi:

The petition of John B. Stone, J. W. English et al., shows that on the 20th day of December, 1875, at the November term of said court, in a certain cause wherein the State of Mississippi, by Geo. E. Harris, att'y gen'l, was plaintiff, and John B. Stone, J. W. English et al. were defendants in a proceeding by information in the nature of a quo warranto filed in said circuit court, judgment was rendered against said respondents thereto and your petitioner'. And petitioner' represents that there is manifest error in the judgment of said circuit court, and that the same should be reviewed by the supreme court of the State of Mississippi, and the errors therein corrected by said supreme court, if any there be, and petitioners therefore pray that a writ of error issue herein, and that the record and proceedings in said cause be certified by the clerk of said circuit court to the supreme court of Mississippi.

JOHN B. STONE.
J. W. ENGLISH.
R. C. BETRAND.

BERCHETT & GILLAND, *Att'ys*.

22 (Endorsed:) Filed Dec'r 22, 1875. J. W. Short, cl'k, by G. F. Brown, jr., D. C.

STATE OF MISSISSIPPI,
Warren County:

Know all men by these presents that we, John B. Stone, J. W. English, R. C. Bertrand et al., principals, and H. N. Martin and George

M. Klein, sureties, are held and firmly bound unto the State of Mississippi in the penal sum of two hundred dollars, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents, this 28th day of December, 1875.

The condition of the above obligation is such, that whereas in a case lately pending in the circuit court of Warren County, wherein State of Mississippi ex rel. George E Harris, att'y general, was plaintiff and John B. Stone, J. W. English et al., were defendants, a judgment was rendered on the 20th day of December, A. D. 1875, a day of the November term, A. D. 1875, of said circuit court of Warren County, in favor
23 of said State of Mississippi ex rel. George E. Harris, att'y general, against said John B. Stone, J. W. English et al., in a proceeding quo warranto, ousting them from certain privileges granted by legislation, and the said John B. Stone et al., conceiving themselves ag'ieved thereby, has prayed for and obtained a writ of error to revise and reverse said judgment, returnable to the next term of our supreme court:

Now, therefore, if the said John B. Stone et al. shall prosecute said writ of error with effect, or in case of failure therein, shall pay, satisfy, and perform such judgment, sentence, or decree as our said supreme court may render in said cause, then this obligation to be void, otherwise to remain in full force and effect.

JOHN B. STONE, [L. S.]
By GEORGE BERCHETT,
Att'y in Fact.
J. W. ENGLISH, [L. S.]
By GEORGE BERCHETT,
Att'y in Fact.
R. C. BERTRAND, [L. S.]
By GEORGE BERCHETT,
Att'y in Fact.
H. N. MARTIN. [SEAL.]
GEORGE M. KLEIN. [SEAL.]

I approve the above bond this 28th day of December, 1875.
JAS. W. SHORT, *Clerk.*

24 The State of Mississippi to the clerk of the circuit court of Warren County, greeting:

Whereas in the record and proceedings, and also in the rendition of the judgment in the circuit court of Warren County, on the 20th day of December, A. D. 1875, in a certain action in said court, where State of Mississippi ex rel. George E. Harris, attorney-general, is plaintiff and John B. Stone, J. W. English et al. are defendants, ousting them from certain priveleges granted by legislation, and also cost of suit against the said John B. Stone, J. W. English et al., manifest error has happened, to the great damage of the said defendants, as by their complaint or petition we are informed, and we being willing that the error, if any has been, should be duly corrected, and full and speedy justice done to the said defendants in this behalf, command you that the record and proceedings aforesaid, with all things touching the same, you, under your hand and seal of office, distinctly and plainly send to the judges of our supreme court, at the capital, in the city of Jackson, full five days before first day of the next term of our said court,
25 to be held as *as* aforesaid, on the third Monday of April next, so

that our said judges, the record and proceedings aforesaid being inspected, may further cause to be done therein what of right and according to law ought to be done, and have then and there this writ.

Given under my hand and the seal of the circuit court of said county of Warren, this 27th day of December, 1875.

JOSEPH W. SHORT, *Clerk*,
By G. F. BROWN, JR., *D. C.*

State of Mississippi to the sheriff of Warren County, greeting:

You are hereby commanded to summon George E. Harris, attorney-general, if to be found in your county, if not, then Magruder & Semrall, his attorneys of record, to be and appear before the judges of the supreme court of said State on the 3rd Monday of April next, at the court-room in the city of Jackson, then and there to answer a writ of error taken out by John B. Stone et al., to revise judgment of the circuit court rendered on the 20th day of December, A. D. 1875, in a certain suit
26 wherein State of Mississippi ex rel. Geo. E. Harris, att'y gen'l, plaintiff, and John B. Stone, et al., defendants.

Herein fail not and have you then and there this writ.

Witness the Hon. E. G. Peyton, presiding judge of the supreme court, the third Monday of October, 1875, and seal of the circuit court of said county of Warren.

Issued by the clerk thereof the 28th day of December, A. D. 1875.

J. W. SHORT, *Clerk*,
By GEO. F. BROWN, JR., *D. C.*

I certify that the above-named John B. Stone et al. have entered into bond filed in my office in the penalty of two hundred dollars, with George M. Klein & H. N. Martin securities, by me approved, and that a writ of error staying all further proceedings on the judgment above mentioned hath been granted accordingly.

Teste:

JOSEPH W. SHORT, *Clerk*,
By G. F. BROWN, JR., *D. C.*

Sheriff's return.

27 Executed the within writ by handing L. W. Magruder, att'y for defendant, a true copy of this writ this 28th day of December, 1875.

W. R. DAVAL, *Sh'ff*,
By D. J. McRAVEN, *D. S.*

STATE OF MISSISSIPPI,
Warren County, ss:

I, Jos. W. Short, clerk of the circuit court of Warren County, State of Mississippi, do hereby certify that the foregoing pages contain a true and complete transcript of the record and proceedings in the case of The State of Mississippi ex rel. George E. Harris, att'y general, vs. John B. Stone, J. W. English, R. C. Bertrand, et al., as the same appears on file and of record in my office.

Witness my hand and seal of said court affixed at office this day of December, 1875.

[SEAL.] JOSEPH W. SHORT, *Clerk.*

28 PROCEEDINGS IN SUPREME COURT OF THE STATE OF MISSISSIPPI.

Foregoing record filed March 17th, 1876.

A. W. LITTLE, *Clerk.*

Order of submission.

October term, 1876.

JOHN B. STONE ET AL.
vs.
STATE OF MISS. EX REL. GEORGE E. HARRIS, att'y gen'l. } 2027.

MONDAY, *Nov'r 27th*, 1877.

Submitted on brief by Mr. Berchett & Gilland and Mr. Frank Johnston, for plaintiffs in error, and by Mr. George E. Harris, for defendant in error.

Decree of affirmance rendered December 4th, 1876.

JOHN B. STONE ET AL.
vs.
THE STATE OF MISS. EX REL. GEORGE E. HARRIS, att'y gen'l. } 2027.

This cause having been submitted on a former day of this term upon the record herein from the circuit court of Warren County, and this court having sufficiently examined and considered the same, and being of opinion that there is no error therein, doth therefore order and adjudge that the judgment of said court rendered in this cause on the 20th day of December, 1875, be and the same is hereby affirmed.

29 And it is further considered, and so ordered and adjudged, that the defendant in error do have and recover of Jno. B. Stone, J. W. English, R. C. Bertrand, and Peter Casey, plaintiffs in error, and of H. N. Martin and George M. Klein, sureties in the writ of error bond, the cost of this cause in this court and in the court below expended or to be taxed, &c.

Motion to dismiss writ of error as to Peter Casey made orally and sustained in the following order:

October term, 1876.

JOHN B. STONE ET AL.
vs.
THE STATE OF MISS., USE, &C. } No. 2027.

JAN'Y 29TH, 1877.

On motion of plaintiffs in error, John B. Stone, J. W. English, and R. C. Bertrand, and upon the suggestion of the death of Peter Casey, one of the plaintiffs in error, and the court being satisfied that said Peter Casey departed this life prior to the judgment rendered in this cause by this court at a former day of this term, and the personal representative,

by his attorney of record, appearing in the court and declining further to join in the writ of error herein, it is now ordered by the court that the order or judgment of affirmance rendered in this cause on
30 a former day of the present term be and the same is hereby set aside and the cause is hereby remanded to the docket.

It is further ordered and adjudged that the writ of error be abated as to said Peter Casey and his personal representatives, and that the cause be proceeded with in the names of said John B. Stone, J. W. English, and R. C. Bertand, plaintiffs in error.

Final judgment.

October term, 1876.

JOHN B. STONE ET AL.
vs.
THE STATE OF MISS., USE, &C. } No. 2027.

MONDAY, *Jan'y 29th*, 1877.

This cause having been this day submitted to the court on briefs for the plaintiffs in error, John B. Stone, J. W. English, and R. C. Bertrand, and on briefs for the defendant in error, and the court having examined and considered the same, and being of opinion that there is no error therein, doth therefore order and adjudge that the judgment of said court rendered in this cause on the 20th day of December, 1875, be and the same is hereby affirmed.

And it is further considered and so ordered and adjudged that the defendant in error do have and recover of the plaintiffs in error, John B. Stone, J. W. English, and R. C. Bertrand, and of H. N. Martin and George M. Kline, sureties on the writ of error bond, the cost of this cause in this court and in the court below expended, &c., to be taxed, &c.

31 Supreme Court of the United States of America,

Know all men by these presents that we, John B. Stone, J. W. English, and R. C. Bertrand, and H. N. Martin and George M. Kline, are held and firmly bound unto the State of Mississippi in the penal sum of five hundred dollars, to be paid to the State of Mississippi, for which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators firmly by these presents, sealed with our seals and dated this the twenty-first day of April, A. D. 1877.

Whereas lately, at the October term, 1876, on the twenty-ninth day of January, A. D. 1877, in a suit depending in the supreme court of the State of Mississippi, wherein the above bound John B. Stone, J. W. English, and R. C. Bertrand were plaintiffs in error, and the State of Mississippi, on relation of George E. Harris, attorney-general of said State, was defendant in error, a judgment was rendered against the said John B. Stone, J. W. English, and R. C. Bertrand, and the said John B. Stone, J. W. English, and R. C. Bertrand having obtained a writ of error to the said supreme court of the State of Mississippi from the Supreme Court of the United States, and filed a copy thereof in the clerk's office of said supreme court of the State of Mississippi, to reverse the
32 judgment of said supreme court of the State of Mississippi in the aforesaid suit, and a citation directed to the said State of Missis-

sippi citing and admonishing to be and *to be and* appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now the condition of the above obligation is such that if the said John B. Stone, J. W. English, & R. C. Bertrand shall prosecute their writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

JOHN B. STONE, [SEAL.]
By GEO. K. BERCHETT,
Att'y in Fact.
J. W. ENGLISH, [SEAL.]
By GEO. K. BERCHETT,
Att'y in Fact.
R. C. BERTRAND, [SEAL.]
By GEO. K. BERCHETT,
Att'y in Fact.
H. N. MARTIN. [SEAL.]
GEO. M. KLEIN. [SEAL.]

Sealed and delivered in the presence of—
STANTON B. PITTMAN.
J. A. ULEM.

The foregoing writ of error bond, with the sureties thereto, approved by me this 21st day of April, A. D. 1877.

[SEAL.] H. F. SIMRALL,
Chief Justice of the Supreme Court of the State of Mississippi.

32½ (Indorsed:) John B. Stone, J. W. English, & R. C. Bertrand vs. The State of Mississippi on relation of the att'y-gen'l, Geo. E. Harris. Writ of error bond.

Filed in my office 21 April, 1877.

A. W. LITTLE, *C'e'k.*

33 To the honorable H. F. Simrall, chief justice of the supreme court of the State of Mississippi:

The petition of John B. Stone, J. W. English, & R. C. Bertrand respectfully represent and state unto your honor that lately was pending in the said supreme court of the State of Mississippi, at Jackson, on a writ of error to the circuit court of Warren County, in said State of Mississippi, a certain cause, wherein your petitioners were plaintiffs in error, and the State of Mississippi, on relation of George E. Harris, attorney-general of said State, was defendant in error, in which said suit was involved the legal question whether the franchises or privileges granted to the Mississippi Agricultural, Educational, and Manufacturing Aid Society by an act of the legislature of the State of Mississippi, approved February 16th, 1867, entitled "An act incorporating the Mississippi Agricultural, Educational, and Manufacturing Aid Society," were revoked and annulled; and whether said act of incorporation was repealed by the constitution of 1869 of the State of Mississippi, Art. XII, sec. 15 (constitution of 1869), and by the act of the legislature of the State of Mississippi approved July 9th, 1870, the question being whether the said act of February 16th, 1867, entitled as above stated, was not a contract within the meaning of and protected by the 10th section of the first article of the Constitution of the United States of America,

34 forbidding any State from passing any law impairing the obligation of contracts, and whether the said clause of the constitution of the State of Mississippi, and the act of the legislature of Mississippi, approved July 9th, 1870, were not in violation of the 14th amendment to the Cons'tution of the United States, forbidding the States from depriving any person of his property without due process of law as respects the rights, franchises, and privileges of operating and carrying on a lottery business, granted by said act of incorporation, and exercised by the petitioners under and by virtue of said act of incorporation, which rights, franchises, and privileges were denied by said constitution of the State of Mississippi, and by said act of the legislature of Mississippi approved July 9th, 1870, in which said suit the decision and judgment of the supreme court of the State of Mississippi was against your petitioners and in favor of the validity of the said provisions of the constitution of 1869, of the State of Mississippi, and in favor of the validity of said last named statute, and said decision and judgment being against the rights and claims of petitioners asserted and claimed under the act of incorporation and protected by the Constitution of the United States as aforesaid.

Said judgment and the record and proceedings in said cause are now in the said supreme court of the State of Mississippi, the highest court of law in said State in which a decision could be had in said State
35 in this cause.

Your petitioners state and show that, as they are advised, the judgment of said supreme court is erroneous and ought to be reversed for this: It affirms the validity of the 12th art., 15th section, of the constitution of the State of Mississippi of 1869, and the act of the Mississippi legislature approved July 9th, 1870, repealing all charters granted to lottery companies, and making it a criminal offense to carry on the business of lotteries in said State, as against the rights and privileges granted to said Mississippi Agricultural, Educational, and Manufacturing Aid Society, and the rights, franchises, and privileges claimed by petitioners under the said act of July 16th, 1867. And said judgment is a denial of the rights, privileges, and franchises claimed and insisted upon by petitioners under said act of July 16th, 1867, and protected by the Constitution of the United States as aforesaid; which said claim being distinctly asserted, claimed, and insisted upon by petitioners in said cause. Said judgment having been rendered on January 29th, 1877, by said supreme court of the State of Mississippi; all of which will more fully appear in and by a duly certified transcript of the record, judgment, and proceedings aforesaid herewith presented.

Wherefore they pray that a writ of error be allowed in said cause, with citation returnable to the next ensuing term of the Supreme
36 Court of the United States, that said judgment may be reviewed, upon their giving bond with sureties for costs, to be approved by your honor according to the statute, &c.

JOHN B. STONE,
J. W. ENGLISH,
R. C. BERTRAND,
By BIRCHETT & GILLAND AND
FRANK JOHNSTON,
Their Attorneys of Record.

A writ of error with citation is hereby allowed as prayed in the foregoing petition upon petitioners entering into bond in the penal sum of

five hundred dollars, with H. N. Martin and George M. Kline sureties, payable to the State of Mississippi, and conditioned according to law.

Given under my hand and seal this the 21st *April* day of April, A. D. 1877.

[SEAL.] H. F. SIMRALL,
Chief Justice of the Supreme Court of the State of Mississippi.

36½ (Indorsed:) John B. Stone, J. W. English, & R. C. Bertrand vs. The State of Mississippi, on relation of George E. Harris, attorney-general. Petition for writ of error.

Filed and deposited in my office this the 21st day of April, 1877.
A. W. LITTLE,
Clk Supreme Court of State of Mississippi.

37 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Mississippi, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Mississippi, before you or some of you, being the highest court of law or equity of said State in which a decision could be had in the suit between John B. Stone, J. W. English, and R. C. Bertrand, plaintiffs in error, and the State of Mississippi, on relation of the attorney-general of said State, George E. Harris, wherein was drawn in question the validity of the constitution of the State of Mississippi of 1869, and a statute of the State of Mississippi, on the ground of their being repugnant to the Constitution of the United States of America, and the decision was in favor of their validity, and against the right, title, privilege, or exemption specially set up or claimed under the Constitution of the United States; and wherein was drawn in question the construction of a clause of the Constitution of the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of said Constitution, a manifest error hath hap-
38 pened, to the great damage of the said John B. Stone, J. W. English, and R. C. Bertrand, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, the second Monday of October, in the year of our Lord one thousand eight hundred and seventy-six.

Issued the 21st day of April, 1877.

[SEAL] GEO. T. SWANN,
Clerk of the Circuit Court of the United States
For the Southern District of Mississippi.

39 This writ of error is allowed by me this the 21st day of April, A. D. 1877.

[SEAL.] H. F. SIMRALL,
Chief Justice of the Supreme Court of the State of Mississippi.

(Indorsed:) John B. Stone, J. W. English, & R. C. Bertrand vs. The State of Mississippi, on relation of George E. Harris, attorney-general. Writ of error.

Filed in my office this 21 April, 1877.

A. W. LITTLE,
Clk Supreme Court of Mississippi.

40 The United States of America to the State of Mississippi, and to George E. Harris, attorney-general of the State of Mississippi.

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Mississippi, wherein John B. Stone, John W. English, and R. C. Bertrand are plaintiffs and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the *the* United States, the second Monday of October, in the year one thousand eight hundred and seventy-six, and H. F. Simrall, chief justice of the supreme court of the State of Mississippi, this the twenty-first day of April A. D. 1877.

[SEAL.] H. F. SIMRALL,
Chief Justice, &c.

41 UNITED STATES OF AMERICA,
Southern District of Mississippi:

Personally appeared before me, George T. Swann, a duly appointed and qualified commissioner to take affidavits, &c., under the acts of Congress in that behalf, in and for said district, Frank Johnston, who, being by me duly sworn according to law, saith that on the 21st day of April, A. D. 1877, at the city of Jackson, in said district, he duly delivered a true copy of the foregoing written citation to George E. Harris, attorney-general of the State of Mississippi, and that on the 21st day of April, A. D. 1877, at said city of Jackson, he delivered a true copy of the foregoing within citation to J. M. Stone, governor of the State of Mississippi.

FRANK JOHNSTON.

Subscribed and sworn to before me this the 21st day of April, A. D. 1877.

[SEAL.] GEO. T. SWANN,
U. S. Com'n'r Cir. C't U. S. So. Dist. Miss.

41½ (Indorsed:) John B. Stone, J. W. English, & R. C. Bertrand vs. The State of Mississippi, on relation of George E. Harris, attorney-general. Citation.

Filed in my office 21 April, 1877.

A. W. LITTLE,
Clk Supreme Court of Mississippi.

42 THE STATE OF MISSISSIPPI,
Hinds County:

I, A. W. Little, clerk of the supreme court of said , do hereby certify that the foregoing pages contain a true and perfect transcript of the record form the circuit court of Warren County in the case of John B. Stone et al. vs. State of Mississippi, ex rel. George E. Harris, att'y gen'l, and also the proceeding of the supreme court in said cause, together with the original petition for writ of error, bond, and citation to Supreme Court of the United States, as the same now appears of record and on file in my office.

Given under my hand and seal of said court this 17th day of May, A. D. 1877.

[SEAL.] A. W. LITTLE,
Clerk Supreme Court.

(Indorsement on cover:) No. 181. John B. Stone, John W. English, & R. C. Bertrand, plaintiffs in error, vs. The State of Mississippi, ex rel. George E. Harris, attorney general. Mississippi sup. c't. Filed 15 September, 1877.

REC. 181—2

39 This writ of error is allowed by me this the 21st day of April, A. D. 1877.

[SEAL.] H. F. SIMRALL,
Chief Justice of the Supreme Court of the State of Mississippi.

(Indorsed:) John B. Stone, J. W. English, & R. C. Bertrand vs. The State of Mississippi, on relation of George E. Harris, attorney-general. Writ of error.

Filed in my office this 21 April, 1877.

A. W. LITTLE,
Clk Supreme Court of Mississippi.

40 The United States of America to the State of Mississippi, and to George E. Harris, attorney-general of the State of Mississippi.

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Mississippi, wherein John B. Stone, John W. English, and R. C. Bertrand are plaintiffs and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the *the* United States, the second Monday of October, in the year one thousand eight hundred and seventy-six, and H. F. Simrall, chief justice of the supreme court of the State of Mississippi, this the twenty-first day of April A. D. 1877.

[SEAL.] H. F. SIMRALL,
Chief Justice, &c.

41 UNITED STATES OF AMERICA,
Southern District of Mississippi:

Personally appeared before me, George T. Swann, a duly appointed and qualified commissioner to take affidavits, &c., under the acts of Congress in that behalf, in and for said district, Frank Johnston, who, being by me duly sworn according to law, saith that on the 21st day of April, A. D. 1877, at the city of Jackson, in said district, he duly delivered a true copy of the foregoing written citation to George E. Harris, attorney-general of the State of Mississippi, and that on the 21st day of April, A. D. 1877, at said city of Jackson, he delivered a true copy of the foregoing within citation to J. M. Stone, governor of the State of Mississippi.

FRANK JOHNSTON.

Subscribed and sworn to before me this the 21st day of April, A. D. 1877.

[SEAL.] GEO. T. SWANN,
U. S. Com'n'r Cir. C't U. S. So. Dist. Miss.

41½ (Indorsed:) John B. Stone, J. W. English, & R. C. Bertrand vs. The State of Mississippi, on relation of George E. Harris, attorney-general. Citation.

Filed in my office 21 April, 1877.

A. W. LITTLE,
Clk Supreme Court of Mississippi.

42 THE STATE OF MISSISSIPPI,
Hinds County:

I, A. W. Little, clerk of the supreme court of said , do hereby certify that the foregoing pages contain a true and perfect transcript of the record form the circuit court of Warren County in the case of John B. Stone et al. vs. State of Mississippi, ex rel. George E. Harris, att'y gen'l, and also the proceeding of the supreme court in said cause, together with the original petition for writ of error, bond, and citation to Supreme Court of the United States, as the same now appears of record and on file in my office.

Given under my hand and seal of said court this 17th day of May, A. D. 1877.

[SEAL.]

A. W. LITTLE,
Clerk Supreme Court.

(Indorsement on cover:) No. 181. John B. Stone, John W. English, & R. C. Bertrand, plaintiffs in error, vs. The State of Mississippi, ex rel. George E. Harris, attorney general. Mississippi sup. c't. Filed 15 September, 1877.

REC. 181—2

OFFICE SUPREME COURT U.S.
FILED
FEB 28 1880

SUPREME COURT UNITED STATES.

JOHN B. STONE et al.

vs.

No. 181.

STATE OF MISSISSIPPI, Ex rel., the Att'y-General.

PHILADELPHIA BAR ASSOCIATION

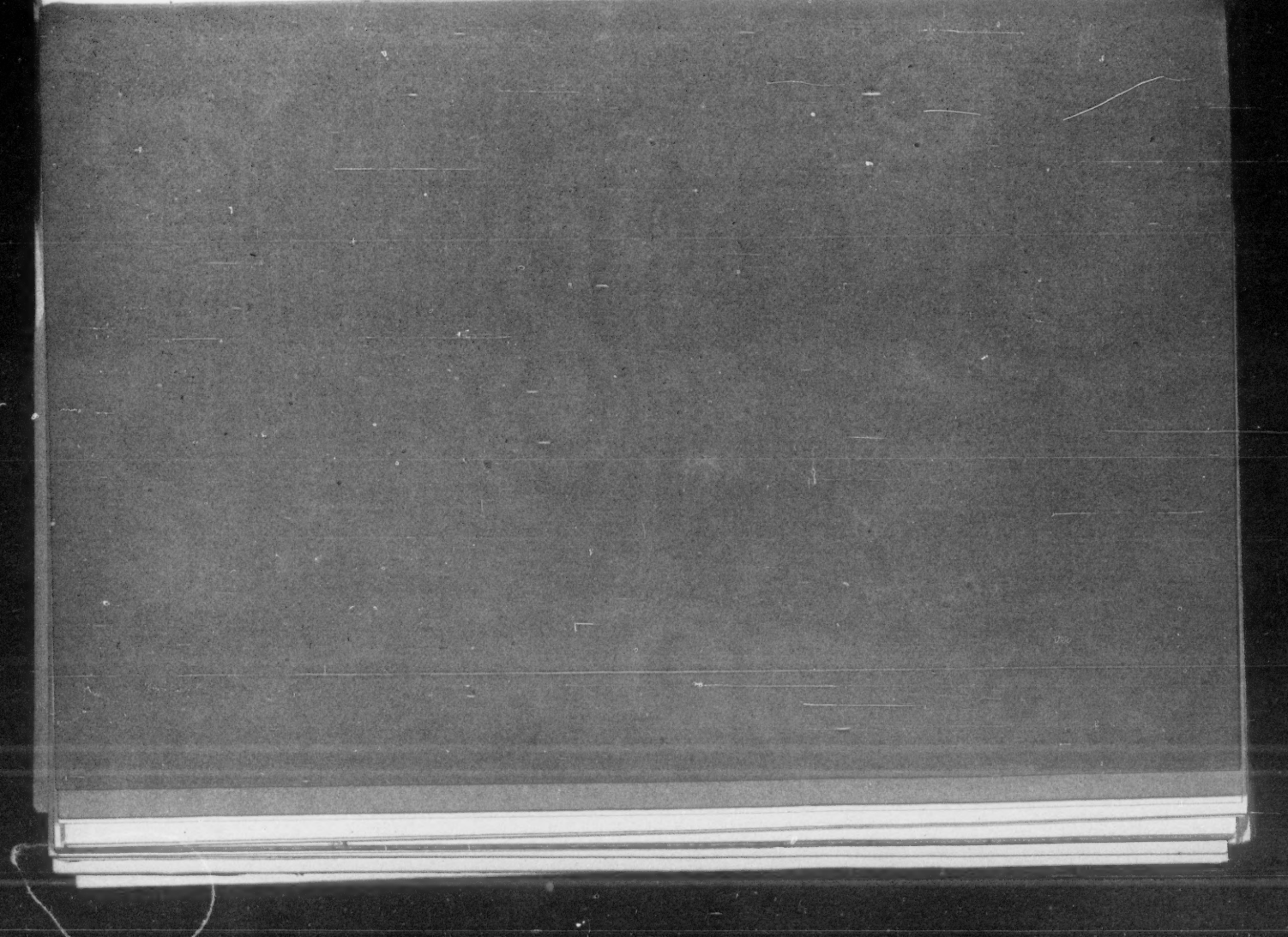
Conway H Black

IS A CONTRACT MADE BY A STATE IN A CHARTER FOR A LOTTERY, WITHIN THE PROTECTION OF THE CONSTITUTION OF THE UNITED STATES?

BRIEF OF P. PHILLIPS.

For Plaintiff in Error.

WASHINGTON, D. C.:
R. O. POLKINHORN, PRINTER,
1880.



In Supreme Court of the United States.

JOHN B. STONE *et al.*
vs.
STATE OF MISSISSIPPI,
Ex Rel., THE ATTY-GENERAL.

No. 181.

Brief of P. Phillips, for Plaintiffs in Error.

On 16 February, 1867, the Legislature of Mississippi passed an Act entitled "an Act incorporating the Mississippi Agricultural and Manufacturing Aid Society."

Sec. 6 provides, that "the corporation shall have power to receive subscriptions, and sell and dispose of certificates of subscriptions which shall entitle the holder thereof to any articles that may be awarded to them, and the distribution of the awards shall be fairly made in public, after advertising, *by the casting of lots, or by lot, chance, or otherwise*, in such manner as shall be directed by the by-laws of said corporation; * * * * and the said corporation shall have power to offer premiums or prizes in money, for the best essays on agriculture, manufactures and education, written by a citizen of Mississippi, or to the most deserving works of art executed by citizens of Mississippi, or the most useful inventions in mechanics, science or art, made by citizens of Mississippi.

Sec. 7 provides, "that the articles to be distributed or awarded may consist of *lands, books, paintings, statues, antiques, scientific instruments or apparatus, or any other property or thing that may be ornamental, valuable, or useful.* * *

Sec. 8. requires the corporation to pay, before the commencement of business, *to the Treasurer of the State, for the use of the University, the sum of $5,000, and to give bond and security for the annual payment of $1,000, together with one half per cent. on the amount of receipts derived from the sale of certificates.*

Sec. 9 declares that, "any neglect or refusal to comply with the provisions of the Act shall work a forfeiture of all the privileges granted, and subject any officer or agent failing to carry out its provisions or committing any fraud in selling tickets at drawing of lottery to indictment, the penalty being a "fine not less than $1,000, and imprisonment not less than six months."

Sec. 11 enacts that, as soon as the sum of $100,000 is subscribed, and the sum of $25,000 paid into the capital stock, the company shall go into operation under their charter and not before, *and the Act of Incorporation shall continue and be in force for the space of twenty-five years from its passage, and that all laws and parts of laws in conflict with its provisions be repealed, and this act shall take effect from and after its passage.*" p. 3.

On 17 March, 1874, seven years after the passage of the above act, the Attorney-General of the State filed the present information in the nature of a *quo warranto* against the present plaintiffs in error, who were exercising the privileges granted by the charter.

On this proceeding the Circuit Court entered a judgment of ouster against the respondents "of and from all the liberties, privileges, franchises, and emoluments exercised by them under and by virtue of said act." 6.

From this judgment a writ of error was sued out; and on 4 December, 1876, the Supreme Court of the State, being of opinion that there was no error, affirmed the judgment. p. 11.

The case is now here on writ of error to the Supreme Court of the State.

Assignment of Error.

The judgment of the Supreme Court of the State, affirming the judgment of the court below, violated the contract made by the State, and deprived the plaintiffs in error of their property without due process of law, and is in conflict with the inhibition in section 10, and the 14th amendment of the Constitution of the United States.

The answer of the respondents to the information avers that they "have fully, in all things, complied with the provisions of the charter, and have, in no wise, forfeited the same." That is to say, they had paid $5,000, before commencing operations, to the State Treasurer for the benefit of the University, and had also paid to the Treasurer, annually thereafter, the sum of $1,000, together with a half per cent. on their receipts.

In rendering the judgment of ouster, it is recited in the judgment itself, that the said "Mississippi Agricultural, Educational and Manufacturing Aid Society," *organized under and fully complied with all the provisions of said act of incorporation, and was engaged in business thereunder.*"

The judgment is based upon article 12, section 15, of the Constitution of 1868, as follows:

"The Legislature shall never authorize any lottery, nor shall the sale of lottery tickets be allowed, *nor shall any lot-*

tery heretofore authorized be permitted to be drawn, or tickets therein to be sold."

This provision was carried into effect by an act passed 16 July, 1870.

These, the judgment held, abrogated the contract made theretofore by the State; and the averment by the respondents "that under their charter they had acquired a vested right by contract with the State, which could not be divested by the subsequent adoption of the Constitution and said act of the Legislature, and that the said provisions of the Constitution and said act of the Legislature are in violation of that provision of the Constitution of the United States, which forbids a State from passing a law impairing the obligation of contracts," was held for naught.

No opinion accompanies either the judgment of the Circuit or that of the Supreme Court.

In discussing the questions presented, we shall assume that the following propositions are well settled by the adjudications of this court.

First. A contract to which a State is a party is as much within the protection of the Federal Constitution as one between individuals.

Second. Charters of incorporation, which are granted not as a part of the machinery of government, but for the benefit of corporations, are contracts between the legislature and the corporation, based for their consideration on the liabilities and duties which the corporators assume by accepting them.

Third. The provision of a State Constitution that violates a contract, is as much within the inhibition of the 10 sec. of the Constitution of the United States, as an Act of the Legislature.

There is, then, but a single question for the determination of this court.

Is the contract with the State for the privilege of distributing by the casting of lot, books, paintings, statues, antiques, &c., &c., as described in the 6 and 7 sections of the Act of 1867, so tainted with immorality as to authorize a subsequent legislature to annul it, and this court to hold that it is not protected by the Federal Constitution?

With the policy of such contracts we do not deal. Whether they should be entered into, depends in some measure upon the condition of the State at the time.

As a general rule, we may admit, they ought not to be granted; but when the exigencies of the State require such assistance, most governments have heretofore, and will hereafter, resort to such means for replenishing their treasury.

The exigencies of the State must be judged of by the legislature at the time the contract is entered into, and I know of no principle of law or of ethics, which would authorize a subsequent legislature, with the money consideration of the contract in its treasury, to take away the benefits of the contract.

The motive here of the legislature, was to assist in sustaining the university of the State. Certainly a most worthy object. We are not, however, called on to inquire into the motive, a decent respect for the legislature entitles their act to be considered as based upon the soundest principles of morality and expediency.

It is not necessary to refer to the action of foreign governments in reference to this subject; it is sufficient to consider our own history—which shows that lotteries, from the earliest settlement of the country, "have been the familiar means of raising funds which could have been secured in no other mode so easily, if at all."

In 1612 a grant of this kind was made to the Virginia Company.

In 1776 it was resolved by Congress, "that a sum of money be raised, by way of lottery, for defraying the expenses of the next campaign." Am. Archives, Vol. 3, 5th Series, 1557. A resolution was also adopted recommending to the Legislatures to pass laws as will effectually prevent the counterfeiting and forging of the tickets of the public lottery.*

Among the eminent men in this Congress were Chase, Rutledge, and Wilson, subsequently members of this court.

In 1812 Congress granted to the city of Washington full power to authorize the drawing of lotteries for the improvement of the city, the object to be submitted to the President and approved by him. The first scheme was approved by him in 1812, and the last under the act in 1821.

By the act of 31 August, 1842, the sale of lottery tickets was prohibited in the District—saving the right held under the city of Alexandria,—"the prohibition not to extend to the selling of the same when authorized by any subsisting license of any of the cities of said District." 5 Stats., 578.

Among the public improvements erected by the city of Washington, from the proceeds of its lottery grants, is the building in which the courts of this District now administer the law.

Sec. III, of the Act 30 June, 1864, after levying a tax of 5 per cent. on the gross receipts of all lotteries, provides, "that the managers of any sanitary fair, or of any charitable, benevolent or religious association, may apply to the Collector of the District and present him proof that

*Note.—The Congress of the United States has neither credit nor the power to tax. It proposed a lottery, and a loan in Europe. Bancroft's History, 5 Vol.

the proceeds of any contemplated lottery, raffle or gift-enterprise will be applied to the relief of sick and wounded soldiers, or to some other charitable
commissioner shall grant a permit to ho
the said sanitary fair or charitable or ben
shall be exempt from all charges, whe
cense in respect of such lottery, raffle or gift-enterprise."

13 Stats., 279.

The act of 3 March, 1865, licenses lotteries,--but no license is to be issued until the managers shall give bond, &c.

It further provides that those who shall engage in such business without first having obtained a license so to do, shall be subject to a penalty, &c.

13 Stats., 472, 485.

The act of 13 July, 1866, contains similar provisions, with a proviso that the license shall not exempt the party from any penalty imposed by the State from carrying on the business.

14 Stat., 122

In adopting these two last acts, Congress did not understand that they provided for punishment of those who refused to pay for a license to commit a crime, or that they were levying a tax for the privilege of committing it.

On the contrary, they regarded this business of lotteries to be a lawful pursuit, in the gains of which the Federal Government might lawfully participate.

License Tax Cases, 5 Wall., 462.

Finally, by the act of 8 June, 1872, to consolidate the statutes relating to the Post Office Department, it is, by the 149 section, made unlawful to convey by mail "any letters or circulars concerning *illegal lotteries*, so called gift concerts, or other similar enterprises or schemes *devised and intended*

In 1612 a grant of this kind was made to the Virginia Company.

In 1776 it was resolved by Congress, "that a sum of money be raised, by way of lottery, for defraying the expenses of the next campaign." Am. Archives, Vol. 3, 5th Series, 1557. A resolution was also adopted recommending to the Legislatures to pass laws as will effectually prevent the counterfeiting and forging of the tickets of the public lottery.*

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By the act of 31 August, 1842, the sale of lottery tickets was prohibited in the District—saving the right held under the city of Alexandria,—"the prohibition not to extend to the selling of the same when authorized by any subsisting license of any of the cities of said District." 5 Stats., 578.

Among the public improvements erected by the city of Washington, from the proceeds of its lottery grants, is the building in which the courts of this District now administer the law.

Sec. III, of the Act 30 June, 1864, after levying a tax of 5 per cent. on the gross receipts of all lotteries, provides, "that the managers of any sanitary fair, or of any charitable, benevolent or religious association, may apply to the Collector of the District and present him proof that

*Note.—The Congress of the United States has neither credit nor the power to tax. It proposed a lottery, and a loan in Europe. Bancroft's History, 5 Vol.

the proceeds of any contemplated lottery, raffle or gift-enterprise will be applied to the relief of sick and wounded soldiers, or to some other charitable use; thereupon, the commissioner shall grant a permit to hold such lottery, and the said sanitary fair or charitable or benevolent association shall be exempt from all charges, whether from tax or license in respect of such lottery, raffle or gift-enterprise."

13 Stats., 279.

The act of 3 March, 1865, licenses lotteries,--but no license is to be issued until the managers shall give bond, &c.

It further provides that those who shall engage in such business without first having obtained a license so to do, shall be subject to a penalty, &c.

13 Stats., 472, 485.

The act of 13 July, 1866, contains similar provisions, with a proviso that the license shall not exempt the party from any penalty imposed by the State from carrying on the business.

14 Stat., 122

In adopting these two last acts, Congress did not understand that they provided for punishment of those who refused to pay for a license to commit a crime, or that they were levying a tax for the privilege of committing it.

On the contrary, they regarded this business of lotteries to be a lawful pursuit, in the gains of which the Federal Government might lawfully participate.

License Tax Cases, 5 Wall., 462.

Finally, by the act of 8 June, 1872, to consolidate the statutes relating to the Post Office Department, it is, by the 149 section, made unlawful to convey by mail "any letters or circulars concerning *illegal lotteries*, so called gift concert or other similar enterprises or schemes *devised and intended*

to deceive and defraud the public for the purpose of obtaining money under false pretences.

17 *Stat.* 302.

This is incorporated in Sec. 3,894 of the Revised Statutes, and by act of 12 July, 1876, this section is amended by striking out the word "illegal."

But the striking out of this word still leaves this section as covering only those enterprises and schemes devised and intended for the purpose of obtaining money under false pretences.

Passing from the legislative action of the Federal government to that of the States we find that similar grants have, at one period or another, been frequently made. As they increased in wealth, which enabled them to dispense with this means for raising money, many of them have forbidden such grants, for in lotteries, as in other things, good and evil, like pleasure and pain, are commingled. But it is not to be doubted that in the future, as in the past, should the necessities of the state require it, those who have now forbidden it would again resort to this means of supplying their needs.

Thus we see that by the constitution of Louisiana just adopted the legislature is expressly authorized to make lottery grants, and this for the benefit of their impoverished fisc.

The history of this State Legislation will be further illustrated in its judicial action.

State decisions.

That such a contract as is now presented is valid, and protected by the Federal Constitution, has been expressly decided in the following States.

DELAWARE.

Says Chancellor Johns—"independent of the Constitution of the United States, the act—(repealing a lottery contract,) though contrary to right, yet as the act of a sovereign power, might be valid, for it is not always that power regards right. Experience teaches us that power unlimited often tramples upon and disregards private rights; but when we turn to the clause in the Constitution of the United States, which appears there inserted as a shield and defense against all legislative actions by a State impairing the obligation of contracts, we feel authorized to say, not only that the legislature had no right, but they had no power to regulate by the act of 1841, the existing contract of 1839."

State vs. *Phelan*, 3 Harr., 454.

MISSOURI.

The establishment and continuance of a lottery is doubtless an evil, but its abolishment by throwing down the legal barriers which have been built up for the protection of the citizen and his property, would be a still greater evil."

Again.

When the power is executed and a contract concluded, whereby a third person acquired the right to conduct a lottery, another and a different question is presented, and the rights thus acquired become vested by the act of the State, and cannot be taken away except by the terms of the contract.

State vs. *Miller*, 50 Mo., 133;
" " " 17 Albany L. J., 243.

Again.

The legislature can no more violate a contract made by themselves, or under their authority, than they can rescind, alter, or impair the obligation of one, made between private parties.

State vs. *Hawthorn*, 9 Mo., 392.

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State v Miller 66. Mo 338

ALABAMA.

Lotteries are not *malum in se*, they are merely *malum prohibitum*. There can be no doubt as to the legislative power to create the contract, and when once made the power of legislative control is gone until the charter expires.

Broadbent vs. *Tuscaloosa*, 45 Ala., 172.

LOUISIANA.

The mere *permission* to draw a lottery, is not, *per se*, a contract, and, *until it has been accepted and rights acquired under it*, is within the control of the Legislature.

Davis vs. *Caldwell*, 2 Rob., 271.

KENTUCKY.

The power of the Legislature to repeal the grant, and thereby withdraw the privilege when no rights have been acquired under the act by which it was created, nor any liability incurred, is clear.

But when vested rights have been acquired under the grant, before the passage of the repealing law, then to the extent of such rights, such repealing law must be regarded as unconstitutional and inoperative.

Gregory's Exors. vs. *Trustees of Shelby College*, 2 Met., 589.

There has been a recent decision in this State, by the Supreme Court, to same effect, but, as yet, I have been unable to obtain it.

NEW YORK.

In an action brought in this State on a bond to secure the payment of prizes to be distributed by a lottery in Kentucky, a demurrer was interposed, on the ground that it was contrary to the laws of New York and against good morals. *Nelson, Judge*, after referring to the doctrine laid down by Story in his conflict of laws, § 258, that the courts of one country are not bound to give effect to the laws of

another which are "against good morals, or religion or public rights," says: "I do not regard the one in question as falling within the class of excepted cases any more than a foreign law allowing interest on money beyond the rule established by our Statute. Indeed, the policy of raising money by lottery for public purposes continued to prevail in this State until 1833, although subsequently prohibited as unwise and inexpedient. It would be rather ungracious for our courts, under these circumstances, to refuse to uphold the contract in question on the ground that it was founded in moral turpitude."

Com. Ky. vs. *Bassford*, 6 Hill, 528.

INDIANA.

In 1807 the territoral government of Indiana incorporated the Vincennes University with power to raise $20,000 for the purpose of procuring a library, The question was, whether Killem, who was engaged in selling tickets, was guilty of a misdemeanor. The court held that "neither the Constitution of 1851, nor any law enacted thereunder, could impair the lottery franchises with which the Vincennes University was endowed by the territorial law incorporating it. The appellant was therefore not guilty of a violation of the misdemeanor act." This case is not yet reported, and for the above statement see Chicago *Legal News*, Nov 22, 1879, p. 88.

Decisions of this Court.

The cases arising under lottery contracts are as follows:

Thompson vs. *Gray*, 1 Wheat., 75;
Cohen vs. *Virginia*, 6 " 264;
Brent vs. *Davis*, 10 " 395;
Cor. Washington vs. *Young*, 10 Wheat., 406;
Clark vs. *Washington*, 12 Wheat., 40;
Shankland vs. *Washington*, 5 Pet., 390.

The above cases arose out of the lotteries authorized under the act of 1812, and these decisions are merely cited as showing that in no one of them is the act assailed on the ground of its immorality; on the contrary, in delivering the opinion in *Brent* vs. *Davis*, Marshal, C. J., takes occasion to say, "the establishment of the lottery thus drawn, can be attended with no pernicious consequence. The transaction throughout was perfectly fair. However questionable may be the *policy* of tolerating lotteries, there can be no question respecting the policy of removing from those who are concerned in them all temptations to fraud."

In *Phalin* vs. *Virginia*, the claims of the corporation for a lottery, was decided against on two grounds which completely disposed of it.

First. That the party had no *contract* by virtue of the act of 1829.

Second. If it had, the *privilege* conferred, had become obsolete from non user.

Nevertheless, in delivering the opinion GRIER, J., says: "it is a principle of the common law, that the King cannot sanction a nuisance. But without asserting that a legislative *license* to raise money by lotteries cannot have the sanctity of a franchise or contract in its nature irrevocable, it cannot be denied that the limitation of such a *license* as the present, is demanded by public policy as other acts of limitation which have received the sanction of this court."

8 How., 168.

In *Boyd* vs. *Alabama*, the defendant claimed the right to draw a lottery under the act of 1868, but this act was held by the Supreme Court of the State to be unconstitutional. On writ of error this court held, that "the act of 1868 being unconstitutional, the contention of the defendant that it constitutes a contract repealable or irrepealable falls to the

ground, and he is left to meet the indictment, founded upon a statute confessedly constitutional, in the best way he can."

This ended the case; but Mr. Justice FIELD, who delivered the opinion, adds, to prevent misconstruction: "We are not prepared to admit that it is competent for one legislature, by any contract with an individual to restrain the power of a subsequent legislature, to legislate for the public welfare, and to that end to suppress any and all practices tending to corrupt the public morals."

94 U. S., 649.

In *Beer Company* vs. *Massachusetts*, the company claimed under its charter of 1828, and against the prohibiting act of 1869. Mr. Justice BRADLEY, delivering the opinion of the court, says, the question is whether the charter contains any contract, the obligation of which was impaired by the prohibiting law? This he disposes of by demonstrating that the charter, in adopting the act of 1809, authorized the Legislature not only to make regulations for the government of the company, but "wholly to repeal the act, or any part thereof establishing the corporation. This reservation of power (says he) was a part of the contract."

This disposed of the case; but the learned Justice goes on to speak of the police powers, and says that this "discretion can no more be bargained away than the power itself," and for this doctrine he cites *Boyd* vs. *Alabama*, *supra*.

97 U. S., 33.

In *Fertilizing Co.* vs. *Hyde Park*, the act of incorporation, 8 March, 1867, authorized the company to establish chemical works for converting dead animals and other animal matter into an agricultural fertilizer.

The employees of the company were indicted for a nuisance under an ordinance of the city.

Mr. Justice SWAYNE in delivering the opinion of a majority of the Court, considers at large the rule of construc-

tion as to the powers delegated to a corporation "Every reasonable doubt is to be resolved adversely. The affirmative must be shown; silence is negation, and doubt is fatal to the claim."

The opinion then holds that the charter is as silent as to taxation, as to liability for nuisances. Can (enquires the learned Justice) exemption be claimed for one more than the other? And the answer is—that the case therefore cited by him is "*conclusive as to both.*"

Further on it is said there is a striking difference between a corporation and a natural person. The latter can do anything forbidden by law, while the former can do only what is so permitted.

Again, it is said that "*if the intent of the Legislature be sought in its charter and its history, it will be found* in accordance with the view we have expressed as matter of law."

In the conclusion of the opinion it is again said: "the owners had no such exemption before they were incorporated, *and we think the charter did not give it to them.*"

There is a class of nuisances designated "*legalized.*" These are cases which rest, for their sanction, upon *the intent of the law* under which they are created."

The foregoing extracts decided the case; but the learned justice goes on to speak of the police power, and cites *inter alia*, *Beer Company* vs. *The Commonwealth.*

We thus have three cases—*Boyd* vs. *Alabama*, *Beer Company* vs. *Mass.*, and *Fertilizing Co.* vs. *Hyde Park*, in which the Court has gone beyond what the exigencies of the cases demanded for their determination, to express opinions as to the reach of the police power of the State.

These opinions, we submit, are *mere obiter dicta*, and do

not, or ought not, to conclude the Court on the question now submitted for its consideration.

The danger of such extra judicial declarations cannot be more strongly illustrated than in these cases.

In *Boyd* vs. *Alabama*, Mr. Justice FIELD says: We are not *prepared to admit* that it is not competent for one legislature, by any contract with an individual, to restrain the power of a subsequent legislature to legislate for the public welfare."

In *Beer Co.* vs. *Mass.*, Mr. Justice BRADLEY says: "This discretion (the use of the police power) can no more be bargained away than the power itself;" and for this he cites *Boyd* vs. *Alabama*, which decided no such proposition, but carefully left the question undecided.

And then we have the case of the *Fertilizing Co.* vs. *Hyde Park*, in which Mr. Justice SWAYNE refers, as authority for what he says, as to the police power, to the case of the *Beer Co.* vs. *Mass.*

This criticism on the opinions delivered in these several cases is fully authorized by what this Court has itself made in their deliberate judgments.

In *Carroll* vs. *Carroll*, Mr. Justice CURTIS, in delivering the opinion of the whole court, said: "If the construction put by the court of a State upon one of its statutes was not a matter in judgment; if it might have been decided either way without affecting any right brought into question, then, according to the principles of the common law, an opinion on such a question is not a decision. To make it so there must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties.

Therefore, this court, and other courts organized under

the common law, has never held itself bound by any part of an opinion, in any case, in which it was not needful to the ascertainment of the right or title in question between the parties.

In *Cohens* vs. *Virginia*, this Court was much pressed with some portion of its opinion in *Marbury* vs. *Madison*, and Chief-Justice MARSHALL said: "It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which they are used. If they go beyond the case they may be respected but ought not to control the judgment in a subsequent suit when the very point is presented."

Mr. Justice CURTIS then adds: "the cases of *Ex parte Christy and Jenness* vs. *Peck*, are an illustration of the rule, that any opinion given here or elsewhere cannot be relied on as a binding authority, unless the case called for its expression."

16 How., 287.

Mr. Justice MILLER took "Time by the forelock " when, in his dissenting opinion in *Fertilizing Co.* vs. *Hyde Park*, he anticipated the danger of going beyond the exigency of the case. He concurred in the judgment, but said: "as the question turns upon the existence of a contract and its nature, and not upon the power of the Legislature to pass laws affecting the health and comfort of the community, a reference to them and to the power to repeal or modify them, when no contract is in question, is irrelevant."

97 U. S., 671.

Police power.

It is maintained that the Legislature, in 1870, had the right to annul the solemn contract founded on a valuable consideration made by the Legislature in 1867, by virtue of what is called the police power. What is this power?

The Constitution speaks of powers *delegated* and powers *reserved* to the States. It also contains *prohibitions*—among others, no State shall pass a law impairing the obligation of a contract; no State shall deprive any one of his property without due process of law. There is no reference in the Constitution to *police powers*.

When a State law is challenged as being in violation of a delegated power, or of a constitutional prohibition, we do not understand how anything is gained by designating it as the exercise of police power. If the power to pass the law has been reserved; if it is not within any of the prohibitions, the act is constitutional; otherwise, it is unconstitutional.

How inconsequential is the use of this term may be seen in the decisions of this court.

What are the police powers of the State?—enquires TANEY, C. J.; "they are (says he) nothing more or less than the powers of government inherent in every sovereignty, to the extent of its dominions; and whether a State passes a quarantine law; or a law to punish offences; or to establish courts of justice; or requiring instruments to be recorded; or to regulate commerce within its limits—in every case it exercises the same power; that is to say, the power of sovereignty—the power to govern men and things within the limits of its dominions.

Upon this question, the *object and motive of the State are of no importance, and cannot influence the decisions. It is a question of power.*"

5 How., 583.

Previous to this, MARSHALL, C. J., in *Gibbons* vs. *Ogden*, had said: "They form a *portion* of that immense mass of legislation which controls every thing within the territory of a State not surrendered to the general government." *

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*STORY, J. The police power extends over all subjects within the territorial limits of the States.

Prigg vs. *Com.*, 16 Pet., 625.

Police powers and sovereign powers are the same; the former being considered so many particular rights under that name or word collectively placed in the hands of the sovereign.

Passenger Cases, 7 How., 424.

This police frequently referred to in the decisions of this court has been, in general terms, somewhat *loosely* called the police power.

Henderson vs. *Mayor*, N. Y., 92 U. S., 271.

Mr. Justice STRONG, in the latest case, thus describes the embarrassment of the Court:

What that power is it is difficult to define with sharp precision. It is generally said to extend to regulations promotive of domestic order, morals, health, and safety. It extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State.

R. R. Co. vs. *Hussen*, 95 U. S., 471.

We might add similar citations from the decisions of the court, but we deem it wholly unnecessary; for whether we take the earliest or the latest attempt to describe what this power is, we would seem to reach this result, to wit: The *police power* is neither more or less than the *reserved power* of the State.

But if the police power is something other and distinct from the reserved powers of the State, we submit that no act of State Legislature can be held valid by this court that invades the powers delegated in the Constitution, or that falls within any of its prohibitions, on the ground that it is the exercise of the police power.

As was said by TANEY, C. J., *supra:* "The object and motive of the State are of no importance, and cannot influence the decision. It is a *question of power.*"

Upon what motive the constitutional prohibition was based, is not apparent. Lotteries may have been deemed immoral, or they may have been forbidden on the mere ground of policy.

But we are not concerned with the motive. That the Legislature had the power, in 1867, to make the contract, and that it did make it, is not denied. In entering into this contract we are justified in saying that they deemed it neither immoral, unwise, or inexpedient.

In *Bartmyer* vs. *Iowa*, the question now discussed is touched by Mr. Justice MILLER: "If the defendant owned the liquor at the time the statute imposed the prohibition on its sale, two very grave questions would arise—first, whether this would be a statute depriving him of his property without due process of law; and secondly, whether, if it were so, it would be a violation so far of the 14th Amendment in that regard as would call for judicial action by this court? Both of these questions, whenever they may be presented to us, are of an importance to require the most careful and serious consideration."

Here the gravity of the question is presented, and properly left open, until the exigency of some future case should demand its determination.

We now submit that this determination was properly reached, and our proposition fully vindicated in the judgments of this court, in *Henderson* vs. *Mayor N. Y.*, 92 U. S., 260, and in *Rail Road* vs. *Hussen*, 95 U. S., 471. In the former the opinion was delivered by Mr. Justice MILLER, in the latter by Mr. Justice STRONG—*and in both the court was unanimous.*

Let it be understood that in both of these cases it was sought to uphold the statute of the State upon the ground that it was the exercise of the police power, and the contention was that "while the power to regulate commerce is granted to Congress, that of establishing police regulations belongs to the State."

These statutes were held to be invalid, as the court decided "it was no answer to say—that they fell under the police power—for whatever might be the nature and extent of that power, *no definition of it and no urgency for its use can authorize a State to exercise it, in regard to a subject matter which has been confided exclusively to the discretion of Congress.*"

The above extract is from the opinion of Mr. Justice MILLER.

In that delivered by Mr. Justice STRONG, the doctrine of the former case is fully sustained, and *Gibbons* vs. *Ogden* is cited, in which MARSHALL, C. J., held "that neither the power of the State to tax, nor any of its large police powers can be exercised to such an extent as to work a practical assumption of the powers conferred upon Congress."

If, then, these two judgments correctly expounded the law, *there is an end to the present controversy.*

But lest it may be said that the other members of the court may have concurred in these judgments without being committed to the doctrine here asserted, we will refer to their opinions delivered in other causes.

In the Slaughter-house Cases, 16 Wall., Mr. Justice FIELD said: "That power undoubtedly extends to all regulations affecting the health, good order, morals, peace, and safety of society. All sorts of restrictions and burdens are imposed under it, and when these are not in conflict with any constitutional *prohibition* or fundamental principles they cannot be sucessfully assailed. But under the pretence of prescribing a police regulation, the State cannot be permitted to encroach upon any of the just rights of the citizen which the Constitution intended to secure against abridgment."

In the same case Mr. Justice BRADLEY said: "The right of a State to regulate the conduct of its citizens is undoubtedly a very broad one, and not to be lightly restricted; but there are certain fundamental rights which this regulation cannot infringe. It may prescribe the manner of their exercise but it cannot subvert the rights themselves." p. 114.

In *Bartmyer* vs. *Iowa*, 18 Wall., both justices, while con-

* Measures calculated to improve the public health provided they do not come in conflict with the powers of the general government are undoubtedly within those reserved to the States
Wilson v Black Bird Creek. 2. Pet 257

curring in the judgment, took occasion to refer to their opinions in the Slaughter-house case.

Mr. Justice BRADLEY said:

"No one has ever doubted that a Legislature may prohibit the vending of articles deemed injurious to the safety of society, *provided it does not interfere with vested rights of property*. When such rights stand in the way of the public good they can be removed by awarding compensation to the owner." p. 36.

Mr. Justice FIELD expressed himself thus: "I have no doubt of the power of the State to regulate the sale of intoxicating liquors when such regulation does not amount to the destruction of the rights of property in them. The right of property in an article involves the power to sell and dispose of such article as well as to use and enjoy it. Any act which declares that the owner shall neither sell it nor dispose of it, nor use and enjoy it, confiscates it, depriving him of his property without due process of law. Against such arbitrary legislation by any State the 14th Amendment affords protection."

Mr. Justice SWAYNE concurred in this as well as in the Slaughter.House cases, in the opinions of Justices FIELD and BRADLEY.

We now add what is held on the subject by Mr. Chief-Justice WAITE in Rail Road Co. vs. Richmond:

"The power to govern implies the power to ordain and establish suitable police regulations; and that it has often been decided authorizes municipal corporations to prohibit the use of locomotives in the public streets *when such action does not interfere with vested rights*."

96 U. S., 528.

This abstract from the opinion of the Chief-Justice, and those of Justices SWAYNE, FIELD, and BRADLEY are in en-

tire harmony with the judgments rendered in *Henderson* vs. *Mayor*, and *Rail Road Company* vs. *Hussen*.

If, as is maintained in these cases, the State act must fall when it conflicts with a power *delegated* to Congress, it requires no argument to show that it must also fall when it conflicts within the *prohibition* of the Constitution.

And, as in the former, the police power cannot save it—so neither in the latter can it be invoked for protection.

To say, now, there was a tacit reservation, that, under the pretence of exercising the police power, the rights of the company may all be taken away without compensation, is, in my opinion, not only unjust, *but unwarranted by any judicial decision heretofore made.*

We have thus carefully presented all the cases in which this Court has considered the so-called police power of the States, and we confidently submit that they result in this—that whatever may be the true definition of this power, its exercise can never be sustained when it invades the domain of Federal legislation, takes away vested rights, or falls within any of the prohibitions of the Constitution of the United States.

It cannot be said in this case, whatever might be claimed in other cases, that the parties to this contract entered into it with the understanding that it was made subject to be at any time abrogated by the State.

Here one of the contracting parties pays a large sum of money—and the other stipulates that in consideration therefor—the powers conferred shall be exercised for a term of years.

In such a contract as this, it is impossible to assume that it was entered into subject to the action of the police power, and this without idemnity.

Mr. Justice MILLER—thus states the proposition in *Fertilizing Co.* vs. *Hyde Park*. "It is said that such contract as may be found in the present case, was made subject to the police power of the Legislature over the class of subjects to which it relates. The extent to which this is true depends upon the specific character of the contract, and not upon the general doctrine."

If (says he) the good of the entire community requires the destruction of the company's rights under this contract, let the entire community pay therefor, by condemning the same for public use."

97 N. S., p. 671.

As argument, I adopt what is said by Mr. Justice STRONG; in the same case, he says: "Had the charter been a mere license instead of a contract, the case would be different; but the Legislature may legalize acts which, without such legislation, would be obnoxious to criminal law. It may authorize that which, without such action, would be a nuisance. It may do this either by law or by contract. It may limit the extent to which the police power shall be exerted, and it often does.

"Crossing highways and running locomotives, when not authorized by law, would be nuisances. Who will contend that, when a charter has been granted for running locomotives, the company, or its agents, can be punished criminally for maintaining a nuisance? Why not? Because there is no nuisance in the eye of the law, and the State has contracted away a portion of its police power. So an illustration may be found in the case of gas companies. If the Legislature charter a gas company, and locate its works at a designated place, authorizing the manufacture of gas there, it would be marvellous, indeed, if the agents of the company could be indicted for a nuisance; or if the Legislature could, without compensation, deny the exercise of the powers granted, because manufacturing gas is offensive, the police

power of the State is no more sacred than its taxing power. We have held again and again, that a State may, by contract with one of its corporations, bind itself not to tax the property of that corporation. If so, why may it not bind itself not to exercise its police power over certain employments?"

We might add an indefinite number of illustrations—involving contracts for the establishment of theatres, concert rooms, race courses, &c., &c. What will be said of an act of Legislature which should declare that all interest was usury, and no recovery should be had on any existing contract for payment of interest, or for interest over a given rate?

To all this we now add the comments of a very able jurist.

"The rights secured to private corporations by their charters, and the manner of their exercise, are subject to such new regulations as from time to time may be made by the State, with a view to the public protection, health and safety, and in order to guard properly the rights of other individuals and corporations.

"The limit to the exercise of the police power in these cases must be this: The regulations must have reference to the comfort, safety or welfare of society; they must not be in conflict with any of the provisions of the charter; and they must not, under pretence of regulation, take from the corporation any of the essential rights and privileges which the charter confers. In short, they must be police regulations, in fact, and not amendments of the charter in curtailment of the corporate franchise."

Cooley Con. Lim., 3d Ed., top p. 576.

We are now brought to the consideration of the opinion

of the Supreme Court of the State, whose judgment we seek to reverse.

The opinion is given in *Moore* vs. *Mississippi*, 48 Miss., 147. It is very brief, and its whole substance is in the following extract:

Mr. PARSONS, in his valuable work on contracts, puts the question: "Can a legislature having *authorised* an individual or a company to raise a certain sum of money by lottery, or having *licensed* individuals to sell spirituous liquors for a certain period, afterwards, for the purpose of preserving the public morals, recall such *license* or *authority* by a general law prohibiting lotteries or the sale of spirituous liquors? And if this can be done where the *grant* or *license* was gratuitous, can it be done if a certain price or premium was paid for it?"

He then proceeds to say: "While the authorities are not uniform, we consider the *prevailing adjudication* in this country to favor the rule, that such general laws are not in either case within the purview of the prohibition of the constitution.

Concurring with Mr. Parsons in this view of the law, we affirm the judge in the court below."

The extract is to be found in 3d vol., p. 556, in which the following is added, to what the court cites:

"If nothing is paid for the *license* or *authority*, the authorities are quite uniform, that it may be taken away by such general law.

"But where a fee or premium has been paid, there are cases which hold this to constitute a contract that is binding on both parties."

The italics are our own; and without stopping to inquire, whether there existed in the mind of the author a distinction between a mere *license*, for which a fee or premium has been paid, and a formal contract founded on a valuable

consideration, we proceed to examine the cases on which he rests the assertion, that "while the authorities are not uniform, we consider the prevailing adjudication of this country to favor the rule, that such general laws are not in either case within the purview or prohibition of the constitution."

The cases referred to by him are—

Phalen vs. *Virginia*, 8 How., 263;
Horn vs. *State of Ohio*, 1 Ohio State, 15;
Baker vs. *Boston*, 12 Pick., 149;
Vanderbilt vs. *Adams*, 7 Cow., 349.

An examination of these cases will show they contain nothing to support the principle that a contract such as exists in this case might be annulled by a subsequent legislature.

Phalen's Case.

In this there was a mere *license* granted in 1829 to a road, then in existence, to raise a certain sum by lottery. No action was had on this, and in 1834 the legislature passed an act limiting the right to six years. It was held that "it might admit of some doubt whether the act of 1829 constitutes any contract with the commissioners or the corporation; that it was true the corporation might receive greater benefits from the repair of the road than other citizens, but the act *imposed no duty on them as a previous consideration.*

But assuming this to be too narrow a construction, and that it conferred a privilege in the nature of an irrevocable contract, it could not be considered illimitable as to time. On the contrary, the object for which the *license* was granted called for immediate action. The sum to be raised being fixed, and the subject of its application demanding *immediate attention*, the time given cannot be claimed to be unlimited; and yet the parties have suffered eleven years

to pass without any attempt to perform their duty or avail themselves of the franchise, and now claim a further term of twenty years to raise the money and repair the road.

The court then asserts the power to pass recording acts and acts of limitation, though they may work a divestiture of title; and then it asks, in reference to the act of 1834, "What is this act but a limitation of the time within which a certain privilege or license, *limited in its very nature and purpose*, may be exercised?"

Further, it is said: "It is a principle of the common law that the King cannot sanction a nuisance. But without asserting that a *legislative license* to raise money by lotteries cannot have the sanctity of an irrevocable contract, it cannot be denied that the limitation of such a license as the present is as much demanded by public policy as *other acts of limitation* which have received the sanction of this court."

It will be perceived how cautiously the court deals with the question where a mere *license* existed. Is it an unwarranted conclusion that if such a contract as this had been under discussion, the reasoning of the court must have led it to the conclusion that it constituted an "irrevocable contract?"

Horn vs. Ohio.

This is a case of *license* to a tavern, for which the license tax was paid. A subsequent statute prohibited the sale of spirituous liquors, and the question arose as to the effect of this upon the tavern. The court held, that as it would be a fraud upon the part of the State to interfere with the right conferred by the license without returning the tax, it would not give the act such a construction as would produce this result.

Baker vs. Boston

was an action on the case for filling up a creek which had

become a nuisance. The court of Massachusetts held that the city government of Boston had the right to remove the nuisance, and, in doing so, if an individual is damaged it is *damnum obsque injuria*. "The law presumes he is compensated by the advantage arising from the general regulation."

But the court takes care to add "it is undoubtedly true that the property of an individual may be appropriated to public use in connection with municipal regulations. In such case compensation must be provided for, or the appropriation will be unconstitutional and void."

Vanderbilt vs. Adams

was an action to enforce a penalty for violating an act authorizing the harbor master at New York to regulate the location of vessels. It was held to be no defence to show that the title to the wharf was in the owner of the vessel. All the wharves were held subject to the police regulations. The power exercised was said to be indispensably necessary where an extensive commerce is carried on. The sovereign power may and ought to prescribe the manner of exercising individual rights over property.

PUBLIC POLICY.

It is not pretended that the act of 1867 is in any degree ambiguous as to the intention of the legislature in conferring the powers claimed under the charter, or that there is any room for the rules of construction as applied to grants of the government.

On the contrary, it is impliedly admitted that this act constituted a contract, plain and complete in all its parts.

It is, however, assailed by the court because its enactment was against "public policy." It says this policy existed from 1822 to 1867, during which time it was prohibited by law.

The State was admitted into the Union in 1817, and her statute book is replete with lottery grants from that period down to 1822. Hence the limitation referred to.

The "times change and we change with them." The policy of the State then was, from 1817 to 1822, in favor of such grants; from 1822 to 1867, the policy was against them; from 1867 to the adoption of the new constitution the policy was again in their favor—now it is again declared against them.

The assault made upon the act of 1867 is not that the policy of the State was at that time against the grant, but that it was so at some past period of the government.

When, in 1867, the legislature made this and other similar grants, could it rest with the judicial department to declare such act inoperative as violative of public policy? If so, then the judiciary in this State is invested with legislative as well as judicial power.

The books are full of warning against the use of such an argument by the judiciary.

There are many things, (says BEST, C. J.,) which most of us think against public policy, for which actions are brought; for instance *wagers*. We ought not to trust ourselves with so dangerous a power as that of acting judicially on disputable policy.

Davis vs. *Bank England*, 2 Bing., 393.

Deciding upon such ground is described by BURROUGHS, J., as "riding an unruly horse," and DWARRIS concludes that "the power—legislative or judicial—in the same hands, with no check or control other than their own will, might be pronounced the very definition of tyranny." Potter's Dwarris.

These emphatic declarations of the English Courts apply with increased force to our form of government, in which

the line of demarcation between the separate departments are carefully drawn by constitutional provisions.

The idea that judges in administering the written law can mould and warp it according to their notions—not of what the legislature said, nor even of what it meant—but what, in their judgment, they ought to have meant; in other words, according to their own ideas of public policy, wisdom or expediency, is so obviously untenable, that it is quite apparent it could never have arisen, except at a time when a division line, between the great powers of the government were but feebly drawn, and their importance but imperfectly understood. In the present condition of our political system, this practice cannot be acted on either with propriety or safety. It must inevitably be attended with two great evils. It gives the judiciary a power almost arbitrary, and which cannot fail to be abused, and it leads to unbounded carelessness in legislation.

Sedgwick, 311;
Priestman vs. *U. S.*, 4 Dal., 31:
Den vs. *Reid*, 10 Pet., 527;
Hadden vs. *Collector*, 5 Wall., 11.

License Cases " " 469

It is, therefore, submitted that, if the charter in question was a valid contract in 1867, no subsequent law, and a *fortiori*, no judicial determination founded on public policy, can render it invalid.

Slavery, which was protected and guaranteed by the Constitution of the United States, has, in the march of events, been abolished. It is now, by a majority of the people, regarded to have been a sin, and, in conformity to this change, many of the new constitutions denounced all contracts founded upon it. Yet this court did not hesitate to enforce these contracts, and to reverse decisions of the State courts made under their direction.

Osborn v Nicholson 13 Wall 633

The Ethical Question.

If it should be held, contrary to the argument now submitted, that the police power is sufficient to abrogate a contract, on the ground of immorality, then it is for this court to determine whether the contract, in this case, brings it within the reach of this power.

It is not enough to say, the Legislature had decided the question. It is one for the courts and not for the Legislature.

Railroad Co. vs. *Husen*, 95 U. S., 473.

Whatever may be the views of a moralist, we use the language of Chief Justice MARSHALL in saying, a jurist must search for the legal solution of such a contract "in those principles of action which are sanctioned by the usages, the national acts, and the general assent of that portion of the world of which he considers himself as a part, and to whose law the appeal is made.

The Antelope, 10 Wheat., 66.

We have heretofore shown the opinions of those who have had control of our Government from its earliest period down to 1864.

In the presence of this history, it would be a strange result, indeed, if this Court should reach the conclusion that the Legislature had the right to outlaw this contract because of its immorality.

What are the acts designated as *mala in se?*

"All offenses, at *common law*, generally are *mala in se;* but playing at games, &c., &c., are only *mala prohibita* to some persons and at certain times, and not *mala in se.*"

Jacobs' Law Dic.

"An offense *malum in se* is one which is naturally evil—as murder, theft, and the like. Offenses at common law are generally *mala in se.* An offense *malum prohibitum*, on

the contrary, is not naturally an evil, but becomes so in consequence of its being forbidden—as playing at games, which, being innocent before, have become unlawful in consequence of being forbidden. Bacon's Abr., Mala prohibita."

2 Bouvier Dic.

Blackstone says: "Crimes and misdemeanors forbidden by the *superior laws* are, therefore, styled *mala in se*—such as murder, theft, and perjury, which contract no additional turpitude from being declared unlawful by the *inferior* legislature. But with regard to things in themselves indifferent, the case is entirely altered. These become either right or wrong, just or unjust, duties or misdemeanors, according as the municipal legislature sees proper for promoting the welfare of the society, and more effectually carrying on the purposes of civil life."

1 Blackstone's Comm., marg. p. 54.

It is asserted (says Herbert Spencer) that there is an absolute standard of rectitude; and, respecting certain classes of actions, it is rightfully so asserted. From the fundamental laws of life, and the conditions of social existence, are deductible certain imperative limitations to individual action —limitations which are essential to a perfect life, individual and social; or, in other words, essential to the greatest possible happiness. And these limitations following inevitably, as they do, from undeniable first principles, deep as the nature of life itself, ~~contribute~~ what we may distinguish as *absolute morality*."

Constitute

"Essays," Moral, Political and Esthetic. p. 210.

Pufendorf has an interesting treatise on "Contracts depending on Chance," in which the whole subject is elaborately considered.

Pufendorf, Law of Nature, Book V, Chap 9, 523.

Thomas Jefferson applied to the Virginia Legislature for

the privilege of disposing of his property by lottery, and in the 9th volume of his works, p. 500, will be found "Thoughts on Lotteries."

We extract the following:

"We have seen then, that every vocation in life is subject to the influence of chance; that so far from being rendered immoral by the admixture of that ingredient, were duly abandoned on that account, man could no longer exist; that among them every one has a natural right to choose that which he thinks most likely to give him comfortable subsistence; but that while the greater number of these pursuits are productive of something which adds to the necessaries and comforts of life, others again, such as cards, dice, &c., are entirely unproductive, doing good to none, injury to many, yet so easy, and so seducing in practice to men of a certain constitution of mind, that they cannot resist the temptation, be the consequences what they may; that in this case, as in those of insanity, idiocy, infancy, &c., &c., it is the duty of society to take them under its protection, even against their own acts, and to restrain their choice of pursuits by suppressing them entirely; *that there are others, as lotteries particularly, which although liable to chance also, are useful for many purposes, and are therefore retained and placed under the discretion of the Legislature, to be permitted or refused, according to the circumstances of every special case, of which they are to judge.*"

Mr. Jefferson then cites of 70 acts of the Virginia Legislature granting lotteries for the benefit of education, navigation, roads, religion, assemblies, private societies, &c., &c.

In conclusion, we submit that if this grant is exercised according to the true intent of the power granted, it differs but little from the powers conferred on "art unions."

As late as 21 and 22 Vic., we have an act exempting "art unions," in disposing of works of "utility and orna-

ment," from the operation of the statute prohibiting lotteries.

That the power exercised was in accordance with the grant, in every respect, is recited in the judgment of ouster.

While the constitution of Mississippi, adopted in 1868, authorizes the outlawry of the contract made by the Legislature in 1867, it yet provides security for those fundamental rights which lie at the base of all just governments.

The "Bill of Rights" accordingly provides:

No person shall be deprived of life, liberty, or property except by due process of law.

No *ex post facto* law, or law impairing the obligation of contracts, shall ever be passed.

Private property shall not be taken for public use, except upon due compensation first to be made to the owner thereof, in a manner to be provided by law.

A decent respect for consistency and the principles thus announced in the "Bill of Rights" should, at least, have required the Legislature—if the public welfare required the abrogation of the contract—to have first returned to the company the bonus paid to the State for the University.

The propositions resulting from the foregoing are:

1. That the Legislature had full power to enter into the contract of 1867.

2. That any subsequent legislation which impairs its obligation falls within the prohibition of the Federal constitution.

3. That the reserved, or so-called police power of the State, cannot be exercised so as to conflict with any of the provisions of the grant. It must not, under pretence of regulation, take from the corporation any of the essential rights and privileges which the charter confers.

Cooley, 577.

4. That if the public welfare should require that the power granted should be resumed, this can only be done by compensation first paid.

5. That whether the contract is so tainted with immorality as to subject it to the action of the Legislature is a question for the determination of the court.

6. That the drawing of a lottery is not *malum in se* at common law—nor has it been so considered in this country—as illustrated by the action of the Federal government and that of the States.

7. That the contract in this case is not subject to any of the evil consequences which are said to attend to the ordinary lotteries for money.

S Phillips

In Supreme Court of the United States.

October Term, 1879.

JOHN B. STONE *et al.*
Plaintiffs in Error.

vs.

THE STATE OF MISSISSIPPI, *Ex rel.*
GEORGE E. HARRIS, *Attorney General.*

No. 181.

In Error to Supreme Court of the State of Mississippi.

I.

Statement of the Case.

This was an information filed by the Attorney General of Mississippi, in behalf of the State against the plaintiffs in error, the defendants in the Court below, requiring them to show by what warrant or authority they exercised the franchise or privilege of issuing and vending lottery tickets in contravention of the laws of the State.

The defendants below, plaintiffs in error here, in their answer set up, by way of defense, an Act passed by the Legislature of Mississippi on the 16th of January, 1867, entitled, "an Act incorporating the Mississippi Agricultural, Educational and Manufacturing Aid Society"; which, it is claimed, conceded to them the franchise of issuing and vending lottery tickets. This Act is set out at length at page 4 of Record.

The answer goes on to admit that there is, in the Constitution of the State, adopted in convention May 15th, 1868, and ratified by the people December 1st, 1869, a provision, Art. XII, Sec. 15, "which declares that the Legislature shall never authorize any lottery; nor shall the sale of lottery tickets be allowed; nor shall any lottery heretofore authorized be permitted to be drawn, or tickets therein to be sold." It farther admits, that the Legislature, by an Act entitled, "an Act enforcing the provisions of the Constitution of the State of Mississippi, prohibiting all kinds of lotteries within said State, approved July 9, 1870, it was made unlawful to conduct a lottery in the State of Mississippi." Rec., p. 3.

They insist that they had complied with all the conditions imposed by the charter, and were conducting business in accordance with its provisions; that the terms of the Constitution and of the Legislative Act, above set forth, interfered with their vested rights and violated the Constitution of the United States, in attempting to impair the obligation of a contract. Rec., p. 3.

The Court below decided against the respondents and gave judgment of ouster. The case was then taken to the Supreme Court of the State, where the judgment was affirmed—and it thence comes, by writ of error, to this Court.

II.

The Constitutionality of the Law under which the Proceedings were had.

The single question for determination is—was the grant by the Legislature in 1867, to the plaintiffs in error, of such a character as is so secured by the Constitution of the United States as to render it irrepealable and unalterable?

The recent decisions of this Court are so conclusive and emphatic on the point as to render anything beyond a reference to them unnecessary.

In *Beer Co.* vs. *Massachusetts*, 97 U. S. Rep., the decision says: "Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health and property of the citizens, and to the preservation of good order and the public morals. The Legislature cannot, by any contract, divest itself of the power to provide for these objects." 97 U. S. Rep., 33.

This passage is cited with approbation in the subsequent case of *Fertilizing Company* vs. *Hyde Park*, 97 U. S. Rep., 669; with the addition, "That the Act is in the nature of a police regulation, in regard to the sale of a certain article of property, and is applicable to the sale of such property by individuals and corporations, even where the charter of the corporation cannot be altered or repealed by the Legislature." Page 669.

At page 667, the Court says: "That a nuisance of a flagrant character existed, is not controverted. It is one of the ordinary functions of the police power of the State to regulate and abate nuisances. The adjudged cases, showing its exercise where corporate franchises are involved, are numerous."

Lotteries are undoubted nuisances, and have been so denounced by this Court. In *Phalen* vs. *Virginia*, 8 Howard, 163, the Court said: "The suppression of nuisances injurious to public health or morality is among the most important duties of government. Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the wide-spread pestilence of lotteries. The former are confined to a few persons and places, but the latter infects the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; it plunders the ignorant and

the simple. It is a principle of the common law, that the king cannot sanction a nuisance."

The evil had attained such magnitude in Mississippi that the convention inserted a provision in the Constitution to suppress it. The Legislature passed an Act to give effect to the provision, and the courts have lent their support to the enforcement of the law. It is hoped that this Court will not now disturb this policy of the State, sanctioned by every branch of its government, and supported by the decisions, already cited, of this high tribunal.

It may not be inappropriate to remark, that one department of the Federal Government is, at this time, doing all in its power to suppress the circulation and sale of lottery tickets through the mails, and thereby to check their prejudicial influences. The sentiment thus forcibly expressed proves that the whole lottery system is an unmitigated nuisance, calculated to pollute the morals of the community, and demanding the most rigid exercise of the powers of the government for its destruction.

All of which is respectfully submitted.

A. M. CLAYTON,
VAN H. MANNING,
for defendants in error.